United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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77-7134

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

Plaintiffs-Appellees,

-against-

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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On Appeal from an Order of the United States District Court
for the Southern District of New York

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Plaintiffs-Appellees,	:	Appeal No. 77-7134
-against-	:	
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Defendants-Appellants.	:	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

To The Honorable Judges Of The United States Court Of Appeals For The Second Circuit:

Appellant Trans World Airlines, Inc. ("TWA"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure, presents this petition for a rehearing in this case, in which the Court dismissed TWA's appeal on the ground that the order of the district court, denying TWA's motion to dismiss the complaint because primary jurisdiction is vested in the Civil Aeronautics Board ("CAB"), is a non-final order not

falling within the exception of the rule established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

Because the decision of the panel (1) is in conflict with decisions of other panels of this Court and is, in effect based on a dissenting opinion of a member of another panel of this Court, (2) fails to resolve an "unsettled" question in this Circuit, (3) will tend to increase, rather than decrease, the burden on the judiciary, and (4) conflicts with the decisions of the Ninth Circuit in Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9th Cir. 1949), and DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9th Cir. 1975), TWA also suggests the appropriateness of a rehearing in banc, pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

I

OTHER PANELS OF THIS COURT HAVE HELD APPEALABLE AN ORDER INVOLVING THE ISSUE OF WHETHER THE DOCTRINE OF PRIMARY JURISDICTION SHOULD BE INVOKED

In holding non-appealable the order in this case, the panel appears to rely on the dissenting opinion of Judge Mulligan in CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974). The majority of the panel in the Aeromatic case held that the Court did have jurisdiction to hear an appeal on whether the doctrine of primary jurisdiction should be invoked.

The panel in Local 771, International Alliance of State Employees v. RKO General, Inc., WOR Division, slip op. 2163 (2d Cir., March 3, 1977), likewise was of the view that an issue regarding the right to trial in a different forum is separate from and collateral to the merits for purposes of applying the Cohen rule. Citing with approval the opinion of the Court in the Aeromatic case, the panel in Local 771 said:

> "Under analogous circumstances we have held that an issue regarding the right to trial in a different forum is separable from and collateral to the merits for purposes of applying the Cohen rule. CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974) (whether CAB had primary jurisdiction held appealable)". (Slip op. at pp. 2169-2170).

Still another panel of this Court (Judges Mansfield, Gurfein and Newman) on March 29, 1977, was of the view that the present case presents important issues meriting appellate review. Judge Mansfield, speaking for the panel on March 29, 1977, so stated in granting TWA's motion for a stay pending appeal.

II

THE SPECIFIC PRIMARY JURISDICTION ISSUE IN THIS CASE IS AN "UNSETTLED" QUESTION IN THIS CIRCUIT

At slip op. 3910, the panel in this case said: "The very case appellants rely on to show appealability -

CAB v. Aeromatic, supra - suggests that the primary jurisdiction in this case may seem 'serious' to appellants, but is not that 'unsettled' in the words of Cohen."

But, the primary jurisdiction issue in this case is an "unsettled" question, insofar as this Circuit is concerned. The specific question of whether a district court should entertain jurisdiction to enjoin the activities of an air carrier at the suit of a private party was expressly reserved by this Court in Civil Aeronautics Board v. Modern Air Transport, Inc., 179 F.2d 622 (2d Cir. 1950). In reserving decision on this question, this Court said: "We express no opinion as to the jurisdiction of the district court to issue an injunction at the suit of a private party". 179 F.2d at 626.

TWA respectfully suggests that whether the CAB should have primary jurisdiction in this case is an "unsettled" question in the words of Cohen, insofar as this Circuit is concerned.*

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* The Ninth Circuit has held that primary jurisdiction in a case such as this one (the challenge by a private party to air transportation conducted pursuant to an exemption granted by the CAB), is vested in the CAB, Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9th Cir. 1949). Furthermore, in DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9th Cir. 1975), the Ninth Circuit has held that a private party has no standing to sue for an injunction under Section 1007(a) of the Act (49 U.S.C. § 1487(a)), where, as here, the challenged conduct involved the alleged violation of a CAB regulation, rather than the strict requirements of § 401(a) of the Act.

III

THE ALLIED AIR FREIGHT CASE IS NOT SIMILAR TO THIS CASE

At slip op. 3907 the panel, while agreeing that the case is "not on all fours", finds support for its present decision in the case of Allied Air Freight, Inc. v. Pan American World Airways, Inc., 340 F.2d 160 (2d Cir.) (per curiam), cert. denied, 381 U.S. 924 (1965).

In the Allied Air Freight case the district court's order granted a stay on the ground that primary jurisdiction was vested in the CAB. This Court dismissed the appeal since "The order below only provides that the case is not to be brought forward on the docket until the Board is given an opportunity to consider what, if any attention it may accord the litigation, and has exhausted that opportunity", 340 F.2d at 161.*

Here, the reverse is true. The district court's order in this case denies the 5-member CAB an opportunity to accord any attention to the litigation.

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* Ultimately this Court held that the doctrine of primary jurisdiction did not apply in the Allied Air Freight case "because plaintiffs did not seek injunctive relief and it is conceded that the alleged agreement is no longer in effect." Allied Air Freight, Inc. v. Pan American World Airways, Inc., 393 F.2d 441, 446 (2d Cir. 1968).

Furthermore, the sole relief sought in the present case is an injunction against the conduct of charter air transportation. Unlike the situation in Allied Air Freight, the CAB is fully empowered to grant the requested relief in this case. 14 C.F.R. § 302.217.

IV

A DETERMINATION OF THIS APPEAL ON THE MERITS WILL NOT RESULT IN ANY EXPANSION OF THE COHEN RULE

At slip op. 3906 the panel quite properly cautions that the Cohen rule "may not be abused by indiscriminate extension" and that "the usual rule of non-appealability for interlocutory orders 'must be kept within narrow bounds.'"

TWA does not suggest that "every interlocutory order involving the issue of primary jurisdiction is per se appealable under the Cohen rule".

TWA does respectfully suggest that in a case of first impression in this Court - the right of a private party under § 1007(a) of the Act (49 U.S.C. § 1487(a)) to enjoin the operations of a regularly scheduled certificated air carrier - a determination of this appeal on the merits is fully warranted.

The burden on the courts will be relieved by a proper reading of § 1007(a) of the Act. Only where opera-

tions are conducted in violation of a specific statutory provision, such as Section 401(a) of the Act, does a private party have standing to seek an injunction. In such a situation there is no need for recourse to the expertise of the CAB. However, here the plaintiffs are asking this Court to interpret the regulations of the CAB. If the courts were to become involved in such an attempt, this could become a burdensome task indeed.*

The violation of law alleged in the complaint is that a regulation of the CAB is being violated.** At least in the first instance the CAB itself should interpret such regulations. The courts should not be encumbered with questions that are more appropriate for determination by the CAB.

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* The CAB charter regulations are set forth at A56-96.

** The gravamen of the complaint is that TWA "possesses and exercises control over the Travellers group" and that "Said relationship violates the CAB regulations governing charter programs" (Complaint, ¶ 24; (A12-13)). The CAB's Bureau of Enforcement takes no position "as to the merits of the[se] allegations" (CAB Amicus Curiae Brief, p.2, fn.**). It should also be noted that the CAB's regulations allegedly violated by TWA constitute a "mechanism" devised by the CAB to avoid the Act's prohibition in the inclusive tour market (49 U.S.C. § 1301(36)) against the marketing by supplemental air carriers of individual tickets directly to members of the general public. Saturn Airways, Inc. v. CAB, 483 F.2d 1284, 1293-1294 (D.C. Cir. 1973). The statutory prohibition does not apply to regularly scheduled air carriers, such as TWA.

Only the CAB may sue under § 1007(a) of the Act to enjoin a violation of its regulations. Congress intended "to let a 'party at interest' file suit only where the strict requirements of the statute itself were being violated, leaving to the Board the power to police violations of its own regulations", DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982, 985 (9th Cir. 1975).

V

THE EFFECT OF THE DECISION IS TO DENY THE DISTRICT COURT THE BENEFIT OF THE ADMINISTRATIVE EXPERTISE OF THE CAB

At slip op. 3909-10 the panel states that TWA's "'right' to litigate before the CAB does not seem overpowering when the CAB is perfectly content to let the district court dispose of the case with the benefit of the CAB's views".

The panel would thus equate the proposed intervention by the CAB's Bureau of Enforcement with the reference of this case to the primary jurisdiction of the full 5-member CAB in order to gain the benefit of the CAB's administrative expertise.

No such equation may properly be made. Furthermore, the Bureau of Enforcement is taking "no position as to the merits of the allegations contained in [plaintiffs'] complaint" (CAB Amicus Curiae Brief, p.2, fn.**).

Yet the basic questions in this case are of the essence of the CAB's jurisdiction, i.e., who shall be allowed to operate charter air transportation across the North Atlantic and how may such operation be conducted?

Plaintiffs' complaint (¶¶ 22, 23; A12) alleges that because of the size of the TAS/TWA charter program and the extent of TWA's marketing and advertising programs, TWA controls TAS in violation of the CAB's regulations. Plaintiffs' suggested interpretation of the CAB's regulations would make it impossible for TWA to engage effectively in charter air transportation. If the CAB's charter regulations are to be construed as plaintiffs would construe them, the regulations are patently unreasonable. The full 5-member CAB should be given an opportunity to construe the regulations which it "phrased and promulgated", American Airlines, Inc. v. Standard Air Lines, Inc., 180 F.Supp. 135, 139 (S.D.N.Y. 1948).

The determination of the basic question in this case, i.e., whether the TAS/TWA charter program meets the criteria established by the CAB in its ABC and ITC regulations, "demands the exercise of administrative discretion

requiring the special knowledge and experience of the administrative tribunal". Civil Aeronautics Board v. Modern Air Transport, 179 F.2d 622, 624 (2d Cir. 1950).

Unless this case is referred to the primary jurisdiction of the CAB, the CAB's special knowledge and experience will not be afforded the district court.

Furthermore, the proposed intervention of the CAB's Bureau of Enforcement in this case, if granted, will complicate further proceedings in the district court with two entirely different complaints. The CAB's Bureau of Enforcement predicates its proposed intervenor's complaint on the charge that the defendant, Travellers Air Services, Inc. ("TAS") - a Delaware corporation, wholly owned by an American citizen - is controlled by Gerald Herrod, a citizen of Great Britian.

TAS vigorously denies this charge,* which is diametrically opposed to the charge in the complaint presently before the Court, i.e., that TWA controls TAS!

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* Whatever the merit of the Bureau of Enforcement's proposed intervenor's complaint, it would involve, if established, at most a technical infraction of the CAB's regulations. Such an infraction may readily be cured and certainly does not require the Draconian relief of an injunction stranding thousands of charter passengers on flights to Europe this summer, the relief sought by plaintiffs in the complaint presently before the Court.

The task of the district court in resolving questions raised by this case will be eased by referring these questions to the primary jurisdiction of the CAB. As the Ninth Circuit said in Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63, 66 (1949): "[P]rior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies".

CONCLUSION

It is respectfully urged that this petition for rehearing be granted, that the rehearing be held by the Honorable Judges of this Court sitting in banc, and that the orders of the district court be, upon further consideration, reversed and the complaint dismissed with costs to appellants.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Harold L. Warner, Jr., a member of the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for Appellant, Trans World Airlines, Inc., do hereby certify that the foregoing petition for a rehearing of this cause, together with the suggestion for a rehearing in banc, is presented in good faith and not for purpose of delay.

Harold L. Warner, Jr.

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Dickstein Shapiro & Morin
Attys for Plaintiffs - Appellees

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